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From:	Errol F. Margolin, Esq.	**Date:**	6/11/2012
Re:	Domsey Trading Corporation, Domsey Fiber Corporation, Domsey International Sales Corporation, a Single Employer and Arthur Salm Individually 29-Ca-14548 et al	**Pages:**	
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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
ATLANTA BRANCH OFFICE
DIVISION OF JUDGES

DOMSEY TRADING CORPORATION, DOMSEY FIBER CORPORATION AND DOMSEY INTERNATIONAL SALES CORPORATION, A Single Employer AND ARTHUR SALM, Individually	Case Nos.	29-CA-14548
		29-CA-14619
and		29-CA-14681
		29-CA-14735
INTERNATIONAL LADIES' GARMENT WORKERS' UNION, AFL-CIO		29-CA-14845
		29-CA-14853
		29-CA-14896
LOCAL 99, INTERNATIONAL LADIES' GARMENT WORKERS UNION, AFL-CIO		29-CA-14983
		29-CA-15012
		29-CA-15119
		29-CA-15124
		29-CA-15137
		29-CA-15147
		29-CA-15323
		29-CA-15324
		29-CA-15325
		29-CA-15332
		29-CA-15393
		29-CA-15413
		29-CA-15447
		29-CA-15685

REQUEST FOR PERMISSION TO APPEAL FROM RULING OF ADMINISTRATIVE LAW JUDGE MICHAEL A. MARCIONESE

Margolin & Pierce, LLP
Attorneys for Respondents
111 West 57th Street – Suite 410
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212-247-4844

To the Honorable Members of the National Labor Relations Board:

Respondents, through their counsel request permission to appeal from two rulings of Administrative Law Judge Michael A. Marcionese, respectively dated June 4, 2012 and June 7, 2012, copies of which are annexed as Exhibits H and J.

BACKGROUND

1. On February 18, 2011 the United States Court of Appeals issued its decision declining to enforce two Supplemental Decisions and Orders of the Board against the corporate respondents (Exhibit A). It did so on the grounds that the Board had abused its discretion in upholding rulings of A.L.J. Marcionese limiting Respondents[1] efforts to cross examine discriminatees as to their immigration status during the backpay period involved, contrary to the teachings of Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137 (2002). The case was remanded for further proceedings consistent with the Court's opinion. The Board reassigned the case to A.L.J. Marcionese.

2. The Second Circuit, in remanding the case had the following to say, as relevant to this request:

> The Board makes one further argument in support of its application for enforcement that we must consider – that, Hoffman notwithstanding, the board may place some limits on immigration-related questioning in compliance proceedings. The only limits the board may place on cross-examination are the usual limits the presider may place on cross-examination. Such a limit may, for instance, require an employer, before embarking on a cross-examination of substantial number of claimants, to proffer a reason why its ICA-required verification of immigration status with regard to a particular claimant now seems questionable, or in error.

[1] Although presently named in the caption o f this proceeding, Respondent Arthur Salm was not at the time a party to it, did not become involved until the Board sought to pierce the Domsey corporations' corporate veil in 2010. The Board's reversal of the A.L.J.'s decision not to hold Salm liable for the corporations' debts is currently on appeal to the Second Circuit.

> While Hoffman was not an evidentiary decision, post-Hoffman, the immigration status of discriminatees has become relevant to the issue of whether backpay may be awarded. Although it is by no means a simple issue, we find that employers may question discriminatees about their immigration status, while also underscoring the Board's legitimate interest in fashioning rules that preserve the integrity of its proceedings.
>
> In sum, we find that employers may cross-examine backpay applicants with regard to their immigration status, and leave it to the Board to fashion evidentiary rules consistent with Hoffman. We also conclude that the A.L.J. erred in not permitting Domsey to ask discriminatees direct questions about their immigration status during the backpay period. Moreover, the A.L.J. should have permitted Domsey to introduce the testimony of its immigration expert in order to meet its burden. We remand to the Board so that it may correct these errors, and trust that this case, which concerns unfair labor practices committed almost twenty years ago, can be brought to its well-deserved conclusion.

(Emphasis added).

3. In response to A.L.J. Marcionese's request for a list of witnesses to be examined Board counsel submitted their letter of April 11, 2012 asserting that only 27 out of the 202 discriminatees for whom over a million dollars in backpay had been awarded, need to be presented for cross-examination. A copy of that letter is annexed as Exhibit B. Part of the Board's rational sought to differ between pre and post IRCA employees. On August 9, 2011, the NLRB, in Mezonos v. Bakery 357 NLRB No. 47 acknowledged that Hoffman Plastic, 535 U.S. 137 (2002) precluded it from awarding backpay to undocumented immigrant workers whether or not the employer had complied with IRCA. Thus, IRCA provides no basis upon which to deny cross-examination of any discriminatee in this case.

4. Request was made of A.L.J. Marcionese for an extension of time to review the record and submit a pre-trial memorandum (Exhibit C). That request was opposed by NLRB counsel (Exhibit D sans attachments), to which we replied (Exhibit E).

5. In response to the foregoing exchange, A.L.J. Marcionese issued his May 11, 2012 "Order Granting In Part Respondents' Request for Extension of Time," directing that Respondent show cause "why any discriminatees, other than the 33 identified in General Counsel's memorandum, should be required to submit to an examination of their immigration status and on what basis." That Order is annexed as Exhibit F. Respondents' "Declaration Showing Cause Why Cross-Examination of Discriminatees As To Immigration Status Should Not Be Limited To The 33 Identified By General Counsel," dated May 24, 2012, is annexed as Exhibit G.

6. Said Declaration (Exhibit G) expressly points out inter alia, that the Second Circuit held that prejudicial error had been committed by the Board in limiting cross-examination as to immigration status 'for the vast majority of discriminatees" and that 27 (or 33) out of 202 is not a "vast majority." The Board's argument that employees were exempt from examination because "expert" testimony at the prior hearing concerning social security numbers had established their immigration status was expressly refuted based on the written record. Respondents argue for the right to cross-examine each discriminatees as to whom that right had been earlier denied, consistent with Hoffman Plastic and the opinion of the Second Circuit. It was also pointed out that it has been decided that unauthorized aliens are not entitled to backpay whether or not IRCA has been complied with.

7. A.L.J. Marcionese, on June 4, 2012 then issued an Order Regarding Remand and Notice of Hearing (Exhibit H) in which he essentially rejects Respondents' argument and accepts Board counsel's contentions as to which discriminates may be examined on remand. He would limit examination as to others "only after a specific showing, as suggested by the Court of

Appeals, that the IRCA required verification of immigration status upon which it relied when hiring the individual claimant 'now seems questionable or in error.'"

8. A.L.J. Marcionese properly labels that showing as a suggestion by the Court of Appeals and not a direction. As seen from that Court's opinion, quoted supra, it is a "may" and not a "must". Applying that requirement to this case, remanded because the cross-examination sought was wrongly denied where the backpay period occurred twenty years ago, the respondents' business long ago shut down and company records long gone, would make it impossible to correct the prejudicial error of the prior proceeding and will defeat the thrust and intent of Hoffman Plastics. The only way the issue can be fairly addressed is to permit cross-examination, where the persons involved can be asked direct questions as to their immigration status during the relevant time period.

9. On June 4, 2102 we wrote to A.L.J. Marcionese, taking issue with his reasoning and interpretation of the Second Circuit Opinion, objected to the conduct of the hearing as limited by his Order pursuant to Section 102.41 of the Rules and Regulations and requested his recusal (Exhibit I). A.L.J. Marcionese responded promptly with his Order denying Respondents' Motion for Recusal, pointing out that six formerly missing employees would be available for questioning in addition to the 27 earlier identified. He reiterated the argument that a "showing" must be made in order to preserve the integrity of the Board's processes, to prove that Respondents' "desire" to question the discriminatees regarding their immigration status is more than a "fishing expedition" (Exhibit J).

10. Respondents contend that the cross-examination of the employees which is sought is not mere "desire" but a right recognized by the Court of Appeals pursuant to Hoffman Plastic, which was wrongly curtailed at the time of the original hearings. It is submitted that due process

and the integrity of fair judicial process as such are at issue here, should be honored by the Board, in lieu of an after – imposed procedural hurdle which, in the circumstances of this case, is inappropriate and will serve only to defeat the purpose and intent of Hoffman Plastic as well as the Second Circuit's Opinion in this case.

11. By reason of the premises, it is prayed that permission to appeal from the rulings at issue be granted and that said rulings be overturned to the extent that they limit cross-examination, so that the Respondents can cross-examine each of the discriminatees whose immigration status is challenged by the Respondents. It is further prayed that the hearing scheduled for June 26, 2012 be stayed pending determination of this request and an opportunity to seek review from the Court of Appeals, if necessary, together with such other and further relief as may be just.

Dated: New York, New York
June 11, 2012

Margolin & Pierce, LLP
Attorneys for Respondents

By: _____
Errol F. Margolin
111 West 57th Street, Suite 410
New York, NY 10019
212-247-4844

EXHIBIT A

10-3356-ag, 08-5165-ag, 08-4845-ag
NLRB v. Domsey Trading Corp.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term, 2010

(Argued: October 20, 2009 Decided: February 18, 2011)

Docket Nos. 10-3356-ag, 08-5165-ag, 08-4845-ag

NATIONAL LABOR RELATIONS BOARD,

Petitioner-Cross-Respondent,

v.

DOMSEY TRADING CORPORATION, DOMSEY FIBER CORPORATION and DOMSEY INTERNATIONAL and DOMSEY INTERNATIONAL SALES CORPORATION, a single employer,

Respondent-Cross-Petitioner.

KEARSE, WINTER, and POOLER, *Circuit Judges.*

The National Labor Relations Board ("NLRB" or "Board") seeks enforcement of two Supplemental Decisions and Orders of the Board against Domsey Trading Corporation, Domsey Fiber Corporation, Domsey International and Domsey International Sales Corporation ("Company" or "Domsey"), a single employer, pursuant to Section 10(e) of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 160(e). *See Domsey Trading Corp.*, 351 NLRB No. 33 (2007); *Domsey Trading Corp.*, 355 NLRB No. 89 (2010). Domsey cross-petitions for review

of the Supplemental Decisions and Orders pursuant to Section 10(e) of the NLRA, 29 U.S.C. § 160(e). We agree that the Board erred when it failed to consider Domsey's objections to the immigration-related evidentiary rulings of the Administrative Law Judge ("ALJ") that were based on pre-*Hoffman* Second Circuit and NLRB case law. *See Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002). We therefore deny the Board's application for enforcement, grant Domsey's petition for review, and remand to the NLRB for further proceedings consistent with this opinion.

JEFF BARHAM, LINDA DREEBEN, JOHN E. HIGGINS, JR., JOHN H. FERGUSON (ROBERT J. ENGLEHART, on the brief) for RONALD MEISBURG, General Counsel, National Labor Relations Board, Washington, D.C., *for Petitioner-Cross-Respondent.*

PAUL FRIEDMAN (DONALD GAMBURG and ANTHONY A. MINGIONE, on the brief), Blank Rome LLP, New York, New York, *for Respondent-Cross-Petitioner.*

POOLER, *Circuit Judge*:

The National Labor Relations Board ("NLRB" or "Board") seeks enforcement of two Supplemental Decisions and Orders of the Board against Domsey Trading Corporation, Domsey Fiber Corporation, Domsey International and Domsey International Sales Corporation ("Company" or "Domsey"), a single employer, pursuant to Section 10(e) of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 160(e). *See Domsey Trading Corp.*, 351 NLRB No. 33 (2007); *Domsey Trading Corp.*, 355 NLRB No. 89 (2010).[1] Domsey cross-petitions for review

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[1] This case comes before this Court a second time, as the Board's two-member Second Supplemental Decision and Order, 353 NLRB No. 12 (2008), was initially dismissed pursuant to

of the Supplemental Decisions and Orders pursuant to Section 10(e) of the NLRA, 29 U.S.C. § 160(e).

We agree that the Board erred when it failed to consider Domsey's objections to the immigration-related evidentiary rulings of the Administrative Law Judge ("ALJ") (Michael A. Marcionese) that were based on pre-*Hoffman* Second Circuit and NLRB case law. *See Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002). We therefore deny the Board's application for enforcement, grant Domsey's petition for review, and remand to the NLRB for further proceedings consistent with this opinion.

BACKGROUND

On January 30, 1990, approximately 200 of Domsey's workers went on strike, alleging that the Company had committed unfair labor practices, including firing several employees for attending union meetings. The strike ended on August 10, 1990, and the striking workers made an unconditional offer to return to work. Subsequently, the NLRB determined that Domsey had committed unfair labor practices before, during, and after the strike and ordered Domsey to reinstate the striking workers. *See Domsey Trading Corp.*, 310 NLRB No. 127 (1993). In a decision dated February 18, 1994, we granted the NLRB's application for enforcement. *See Domsey Trading Corp. v. NLRB*, 16 F.3d 517 (2d Cir. 1994) (Winter, *J.*).

On August 20, 1997, the NLRB issued a Compliance Specification and Notice of Hearing

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the Supreme Court's decision in *New Process Steel, L.P. v. NLRB*, 130 S.Ct. 2635, 2010 WL 2400089 (2010). *NLRB v. Domsey Trading Corp.*, 08-4845-ag, 08-5165-ag (Jun. 30, 2010). Following this Court's order, a three-member panel of the Board issued a Second Supplemental Decision and Order on August 16, 2010, incorporating the two-member Decision of September 25, 2008. There is no substantive difference between the two Supplemental Decisions, and the parties re-submitted the case based upon their previously filed briefs and the oral argument held on October 20, 2009.

before an ALJ to determine the backpay owed by Domsey to the striking workers. In its Answer to the Compliance Specification,[2] and again during the compliance hearing, Domsey raised the issue of immigration status, arguing that undocumented immigrants were ineligible for backpay under the NLRA pursuant to *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984). ALJ Marcionese, following then-current NLRB and Second Circuit case law interpreting *Sure-Tan*, denied Domsey's request to ask discriminatees questions about their immigration status during the backpay period. Instead, the ALJ limited Domsey to asking whether the discriminatees' immigration status affected their ability to find work during the backpay period, which he found relevant to mitigation of damages. Later, concerned that Domsey was engaging in a "fishing expedition," the ALJ limited this line of questioning to pre-IRCA[3] hires and post-IRCA hires who Domsey had reason to believe did not have lawful immigration status. He reasoned that Domsey should know the discriminatees' immigration status if they were hired post-IRCA because the company was required by law to verify the information.

Later in the course of the compliance hearing, Domsey submitted a proffer of an immigration expert the Company intended to call to rebut the testimony of some discriminatees who had testified that they had work authorization during the backpay period and to cast doubt on

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[2] In addition to raising immigration-related affirmative defenses for several specific discriminatees, Domsey raised this general affirmative defense in its Answer:

> [I]n the event that it is determined that any of the employees affected are undocumented aliens, the Answer is intended to include that such employee is not entitled to receive backpay for any period of time that they were not authorized to work in the United States.

[3] The Immigration Reform and Control Act of 1986 ("IRCA") made it illegal to knowingly hire undocumented immigrants and required employers to verify the immigration status of newly-hired employees. *See* 8 U.S.C. § 1324a.

the immigration status of other discriminatees who had not testified about their immigration status. The expert was prepared to testify that anomalies in some discriminatees' social security numbers and work authorization documents indicated that they had submitted fraudulent documents and did not have work authorization during the backpay period. Consistent with his previous immigration-related rulings, the ALJ rejected the proffer and prohibited the expert from testifying on the grounds that such testimony was irrelevant.

After fifty-three days of hearings conducted between October 27, 1997, and January 29, 1999, the ALJ issued a Supplemental Decision on October 4, 1999, awarding $1,075,614.30 in backpay to 202 discriminatees. In the decision, the ALJ reaffirmed his ruling that Domsey was not permitted to inquire into the discriminatees' immigration status during the backpay period. The Company filed its objections to the Supplemental Decision with the Board on December 15, 1999. Specifically, the Company objected to the ALJ's immigration-related evidentiary rulings "wherein [ALJ] Marcionese precluded [Domsey] from questioning the claimants about their ability to obtain work in this country legally." Domsey also objected to the ALJ's ruling excluding the testimony of its immigration expert.

After the ALJ issued his Supplemental Decision but before the NLRB had issued its decision, the Supreme Court decided *Hoffman*, 535 U.S. 137, which held that undocumented aliens are not entitled to backpay under the NLRA. In *Hoffman*, an employee who was fired because of his union activities admitted during the subsequent compliance hearing that he was undocumented and that he had provided fraudulent documents to his employer. While acknowledging that the Board enjoys broad discretion in fashioning remedies under the NLRA, the Supreme Court concluded that "allowing the Board to award backpay to illegal aliens would

unduly trench upon explicit statutory prohibitions critical to federal immigration policy, as expressed in IRCA" by "encourag[ing] the successful evasion of apprehension by immigration authorities, condon[ing] prior violations of the immigration laws, and encourag[ing] future violations." *Id.* at 151. Thus, "[h]owever broad the Board's discretion to fashion remedies when dealing only with the NLRA," the Court concluded, "it is not so unbounded as to authorize this sort of an award." *Id.* at 151-52.

On September 30, 2007, more than five years after *Hoffman* was decided, the Board issued its Supplemental Decision and Order, 351 NLRB No. 33, affirming in part and reversing in part the ALJ's proposed decision. The Board held that *Hoffman* precluded an award of backpay to the four discriminatees who admitted to being undocumented during the backpay period. The Board also remanded with respect to six additional discriminatees because "issues ha[d] been raised" about their immigration status during the compliance hearing. However, the Board did not address Domsey's objection to the ALJ's ruling that it was not permitted to ask most discriminatees about their immigration status.[4]

On remand, the ALJ awarded backpay to two of the six individuals and made partial awards to two others. The General Counsel was unable to verify the immigration status of the remaining two individuals and withdrew their claims. Domsey then filed its objections to the proposed Second Supplemental Decision with the Board, "retain[ing] and restat[ing] its objections and exceptions to the ALJ's original . . . denial of Respondent's attempts to inquire as

[4] The Board did state in a footnote that "[t]he Respondent inquired not only to ascertain whether such status affected the search for work, but also to determine whether it affected eligibility for backpay. This was true for all discriminatees discussed in this section." This footnote did not, however, address Domsey's argument that for the vast majority of discriminatees, it was improperly prohibited from asking about immigration status.

to the [discriminatees'] immigration status and ability to work legally in the United States during the backpay period." On September 25, 2008, the Board adopted the ALJ's decision, failing again to address Domsey's objection to the ALJ's immigration-related evidentiary rulings. These petitions for enforcement and petition for review followed.

DISCUSSION

The central issue in this case is an evidentiary one – namely, what limits the Board may place on the introduction and discovery of evidence that is relevant to one of an employer's affirmative defenses, in this case, immigration status. Congress has entrusted the NLRB with "wide discretion" to manage its internal processes, including the fashioning of evidentiary rules. *Carpenter Sprinkler Corp. v. NLRB*, 605 F.2d 60, 66 (2d Cir. 1979). We therefore review the Board's evidentiary rulings for abuse of discretion. *See id.*; *Wright Elec., Inc. v. NLRB*, 200 F.3d 1162, 1168 (8th Cir. 2000); *NLRB v. Kolkka*, 170 F.3d 937, 942 (9th Cir. 1999). As in other contexts, the Board "has abused its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence, or rendered a decision that cannot be located within the range of permissible decisions." *Snell Island SNF LLC v. NLRB*, 568 F.3d 410, 424 (2d Cir. 2009) (quoting *Sims v. Blot*, 534 F.3d 117, 132 (2d Cir. 2008), *vacated on other grounds*, 130 S.Ct. 3498 (2010)).

I.

As an initial matter, the Board argues on appeal that this Court lacks jurisdiction to consider Domsey's objections to the ALJ's immigration-related rulings because Domsey failed to preserve these objections before the Board. *See* 29 U.S.C. § 160(e); *Elec. Contractors, Inc. v. NLRB*, 245 F.3d 109, 123 (2d Cir. 2001). According to the Board, Domsey made specific

objections to the immigration status of only 12 discriminatees and the Board properly considered these objections. The Board contends that Domsey's "general" objection to the ALJ's immigration-related rulings is insufficient to preserve Domsey's arguments with respect to the other discriminatees' immigration status.

The Board misunderstands the nature of Domsey's objection. Domsey does not argue on appeal that each of the discriminatees was undocumented during the backpay period. Indeed, Domsey would be hard-pressed to make such an argument given that, in most cases, there is no direct evidence in the record concerning the discriminatees' immigration status. Instead, Domsey argues that it was prohibited from eliciting relevant testimony from discriminatees and was therefore unable to prove its affirmative defense; it seeks a remand so that it may be permitted to question discriminatees about their immigration status during the backpay period and to introduce the testimony of its immigration expert. In short, Domsey's "general" objection is actually a very specific objection to the ALJ's immigration-related evidentiary rulings. Thus defined, there is no question that Domsey preserved its objection. It reiterated this objection after the ALJ issued his proposed Second Supplemental Decision. The Board's argument that Domsey somehow waived this objection is without merit.[5]

II.

Having concluded that Domsey has preserved its objection to the ALJ's immigration-related rulings, we further conclude that the Board abused its discretion by failing to remand the

[5] Similarly, the Board's argument that Domsey has waived any objection with respect to discriminatees not mentioned in Domsey's brief is unavailing. Domsey's reference to the questionable immigration status of certain discriminatees was intended to bolster Domsey's argument that it should have been permitted to ask about immigration status, and was not a direct challenge to the discriminatees' backpay awards.

case to the ALJ for further proceedings consistent with *Hoffman*. The ruling that Domsey could not ask discriminatees questions concerning their immigration status was premised on pre-*Hoffman* Second Circuit and NLRB case law that had concluded that immigration status was irrelevant to backpay eligibility under the NLRA. *See NLRB v. A.P.R.A. Fuel Oil Buyers Group, Inc.*, 134 F.3d 50 (2d Cir. 1997); *Hoffman Plastic Compounds, Inc.*, 326 NLRB No. 86 (1998); *see also Hoffman Plastic Compounds, Inc., v. NLRB*, 535 U.S. 137 (2002) (abrogating both cases).[6] When Domsey later renewed its objection to the ruling, the ALJ again emphasized that he was following current NLRB law and that he was not going to "revise [his] ruling based on speculation that the Supreme Court may find that there is a split in the Circuits and that the issue needs to be addressed at that level."

After *Hoffman*, it is now clear that undocumented immigrants are ineligible for backpay under the NLRA and, therefore, that immigration status is relevant to the question of backpay eligibility. While relevance is certainly not the only consideration when deciding what evidence is admissible, an affirmative defense would be illusory if all evidence that could be used to prove it were categorically excluded. Of course, the ALJ did not have the benefit of *Hoffman* when he made his immigration-related rulings. The Board's decision, however, was issued five years after *Hoffman*, and we are perplexed as to why the Board chose to ignore Domsey's objection to the

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[6] The ALJ explained his ruling as follows:

> [R]ather than burden the record with questioning of all of these witnesses for some potential future decision that may come down from the Court of Appeals or the Supreme Court, . . . I'm going to follow the Board's decision and essentially I'm going to rule that any questions with respect to whether or not they had documents to allow them to work during the back pay period is irrelevant under the Board's current view of the law in terms of alien's rights to back pay during that period of time.

ALJ's evidentiary rulings, even after acknowledging that *Hoffman* precludes a backpay award to undocumented immigrants. **[SPA-181]** This omission ratified the ALJ's ruling, which was based on an outdated and erroneous view of the law. We conclude that this was an abuse of discretion.

III.

The Board makes one further argument in support of its application for enforcement that we must consider – that, *Hoffman* notwithstanding, the Board may place some limits on immigration-related questioning in compliance proceedings. The only limits the Board may place on cross-examination are the usual limits the presider may place on cross-examination. Such a limit may, for instance, require an employer, before embarking on a cross-examination of a substantial number of claimants, to proffer a reason why its IRCA-required verification of immigration status with regard to a particular claimant now seems questionable, or in error.

While *Hoffman* was not an evidentiary decision, post-*Hoffman*, the immigration status of discriminatees has become relevant to the issue of whether backpay may be awarded. Although it is by no means a simple issue, we find that employers may question discriminatees about their immigration status, while also underscoring the Board's legitimate interest in fashioning rules that preserve the integrity of its proceedings.

In sum, we find that employers may cross-examine backpay applicants with regard to their immigration status, and leave it to the Board to fashion evidentiary rules consistent with *Hoffman*. We also conclude that the ALJ erred in not permitting Domsey to ask discriminatees direct questions about their immigration status during the backpay period. Moreover, the ALJ should have permitted Domsey to introduce the testimony of its immigration expert in order to meet its burden. We remand to the Board so that it may correct these errors, and trust that this case, which

concerns unfair labor practices committed almost twenty years ago, can be brought to its well-deserved conclusion.

CONCLUSION

We have considered all of the parties' contentions in support of their respective petitions and, except as indicated above, have found them to be without merit. For the foregoing reasons, we GRANT Domsey's petition for review, DENY the Board's application for enforcement, and REMAND to the Board for further proceedings consistent with this opinion.

EXHIBIT B

United States Government
NATIONAL LABOR RELATIONS BOARD
Region 29
Two MetroTech Center – 5th Floor
Brooklyn, New York 11201-4201
(718) 330-2146 Fax: (718) 330-7579

April 11, 2012

By Fax: (212) 247-1155
Errol F. Margolin, Esq.
Margolin & Pierce LLP
111 West 57th Street – Suite 410
New York, New York 10019

Re: Domsey Trading Corp., *et al.*
Case No.: 29-CA-14548 et al

Dear Mr. Margolin:

In accordance with Judge Marcionese's direction, please find below a list of those Domsey discriminatees (or a relative of those who are deceased) who Counsel for the Acting General Counsel believe you are entitled to examine pursuant to the Board's remand.

1. Marie Ahrendts
2. Francois Alexander
3. Andreze Andral
4. Joseph Aris
5. Marie Camille
6. Adrian Castillo
7. Eugenie Charles
8. Anne Cidieufort (deceased)
9. Gertha Denaud
10. Jean Joseph Bonny Eliacin
11. Eduardo Roman Feliciano (deceased)
12. Luis Ramos Frederick
13. Marie Gresseau
14. Rufino Guity
15. Eloge Jean Baptiste
16. Rachel Louissant
17. Nilda Matos
18. Alta Meuse
19. Marie Narcisse (deceased)
20. Rufino Morales
21. Oscar Nunez
22. Juana Peralta
23. Marie Thelismond
24. Victor Agare
25. idiemese Lovinski
26. Marcus Pitillo
27. Romulo Ramirez

All of the remaining Domsey discriminatees are exempt from testifying because: (1) Respondents' expert witness established that those employees were employed using valid social security numbers: (2) the employees were already examined on their status; (3) they were pre-IRCA hires whose examination was not precluded; (4) their

examination was waived; or (5) their status was determined in the Board's September 25, 2008 Supplemental Order.

We are prepared to consider any arguments or record evidence that you believe supports a broader list of those discriminatees who Respondents believe they are entitled to examine on remand. Do not hesitate to contact me.

Very truly yours,

Kathy Drew King
Counsel for the Acting General Counsel
Region 29
National Labor Relations Board

EXHIBIT C

May 7, 2012

Honorable Michael A. Marcionese
National Labor Relations Board
Division of Judges
401 West Peachtree Street, N.W.
Suite 1708
Atlanta, GA 30308-3510

Re: Domsey Trading Corp., et al.
Case Nos. 29-CA-14548, et al.

Dear Judge Marcionese:

As we advised during the course of our recent telephone conference, our firm was not involved in any of the Domsey related litigation before being retained to represent Arthur Salm personally in August, 2010. Our work in that regard has been to defend Mr. Salm against the Board's effort to "pierce the corporate veil" and hold him personally liable for what the Domsey corporations may owe to so-called discriminatees (an amount not yet finalized). We do not have copies of or access to the record developed during the prior proceedings before you, however regional Board counsel have most courteously agreed to allow us to review the Board's copy of the record starting at noon, Tuesday, May 8th.

In consequence, we have not yet been able to comply with Your Honor's instruction to identify a list of necessary witnesses to recall and draft a proper Pre-Trial Memorandum. The record, we are told encompasses 14 months of trial involving over 150 witnesses. In order to discharge our professional legal responsibility to our clients in this matter, we are compelled to ask you to extend our time to identify witnesses for 30 days and move the trial date back accordingly.

DOCUMENTS TO BE PRODUCED

1. All contracts or agreements between Defendant and 240/242 Franklin relating to the Project and/or the Building.

2. All documents, including, but not limited to, correspondence, exchanged between Defendant and 240-242 Franklin relating to the Project and/or the Building.

3. All contracts or agreements between Defendant and Marke relating to the Project and/or the Building.

4. All documents, including, but not limited to, correspondence, exchanged between Defendant and Marke relating to the Project and/or the Building.

5. All contracts or agreement between Defendant and Scarano relating to the Project and/or the Building.

6. All documents, including, but not limited to, correspondence, exchanged between Defendant and Scarano relating to the Project and/or the Building.

7. All documents, including, but not limited to, agreements and correspondence, exchanged between Defendant and any individual or entity hired or retained by Defendant, 240/242 Franklin Avenue, Marke or Scarano in connection with the Project and/or the Building.

8. All internal correspondence between the members and/or employees of Defendant concerning the Project and/or the Building.

9. All communications between Defendant and owners of the Units concerning the Project and/or the Building.

10. All marketing materials relating to the Building, including, but not limited to brochures and advertisements.

11. All documents previously produced or exchanged among the parties in the Action.

12. All documents on which Defendant intends to rely in the prosecution or defense of this Action.

Dated: New York, New York
May 21, 2012

SEYFARTH SHAW LLP

By: _____
Alexander M. Jeffrey
Jay W. Cho

620 Eighth Avenue
New York, New York 10018
Tel. (212) 218-5500

Attorneys for the Board of Managers of Marke Gardens Condominium

TO: Errol F. Margolin, Esq.
MARGOLIN & PIERCE LLP
111 West 57th Street, Suite 410
New York, New York 10019
(212) 682-6800
Attorneys for Defendant Corcoran Group-Brooklyn Landmark, LLC d/b/a Corcoran Group Brooklyn

INTERROGATORIES

1. Identify each and every person with whom Defendant consulted and or upon whom Defendant relied, or who otherwise constituted a source of information for Defendant in connection with the preparation of: (i) the Answer; and (ii) the answers to these interrogatories.

2. Identify each and every person who possesses knowledge or information relevant to the subject matter of the Action, and identify by name, title, address, telephone number of any such person.

3. Identify the existence, custodian, location and general description of documents, including electronically maintained information and communications, relevant to the subject matter of the Action.

4. Identify all insurance agreements, if any, that provide coverage for the claims asserted against Defendant in the Action.

5. Describe the steps taken to preserve and collect electronically stored information relevant to the Action, the allegations in the Complaint and/or the Answer.

6. Set forth the factual basis for your contention that "[t]he complaint fails to state a cause of action as to this answering defendant," as alleged in the First Affirmative Defense of the Answer.

7. Set forth the factual basis for your Second Affirmative Defense of the Answer.

8. Set forth the factual basis for your contention that "[t]he transactions over which plaintiff sues are private transactions not of a recurring nature and are thus outside the scope of General Business Law Sections 349 and 350," as alleged in the Third Affirmative Defense of the Answer.

9. Identify each person you may or will call to testify on your behalf at trial of this Action, and state the subject matter of such person(s)' anticipated testimony.

10. To the extent not requested above, identify and describe in detail all oral and written communications between Defendant and any person referring, reflecting or relating to any subject matter alleged in the Complaint.

Dated: New York, New York
May 21, 2012

SEYFARTH SHAW LLP

By: _____
Alexander M. Jeffrey
Jay W. Cho

620 Eighth Avenue
New York, New York 10018
Tel. (212) 218-5500

Attorneys for the Board of Managers of Marke Gardens Condominium

TO: Errol F. Margolin, Esq.
MARGOLIN & PIERCE LLP
111 West 57th Street, Suite 410
New York, New York 10019
(212) 682-6800
Attorneys for Defendant Corcoran Group-Brooklyn Landmark, LLC d/b/a Corcoran Group Brooklyn

We would not be asking for this relief were it not absolutely necessary and ask that you exercise your discretion accordingly, with a view toward providing both sides of this remanded controversy with the opportunity for a full and fair hearing, consistent with the tenets of due process.

Respectfully,

Margolin & Pierce, LLP

By_____
Philip Pierce

Cc:

Aggie Kapelman
Kathy Drew King
Counsel for the Acting
General Counsel
National Labor Relations Board
Region 29
Two MetroTech Center – Suite 5100
Brooklyn, NY 11201-4201

EXHIBIT D

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
REGION 29
TWO METROTECH CENTER SUITE 5100
BROOKLYN, NY 11201-3838

Agency Website:
www.nlrb.gov
Telephone: (718)330-7713
Fax: (718)330-7579

May 10, 2012

By E-File
Honorable Michael A. Marcionese
National Labor Relations Board
Division of Judges
401 West Peachtree Street, N.W.
Suite 1708
Atlanta, GA 30308-3510

Re: Domsey Trading Corp., et al.
Case Nos. 29-CA-14548, et al.

Dear Judge Marcionese:

This morning Counsel for the Acting General Counsel was informed by Ms. Bailey that, on May 8, 2012, Respondents in the above matter filed a request for an extension of time to file their Pre-Trial Memorandum, which was due on May 1, 2012. Counsel for the Acting General Counsel had not been served with this request and thus had no knowledge of it until Ms. Bailey's telephone call. Counsel for the Acting General Counsel opposes Respondents' request.

On May 2, 2012, one day after the filing date ordered by your Honor, Respondents' counsel, Errol Margolin, requested that Counsel for the Acting General Counsel consent to a sixty (60) day extension of time to file their Memorandum. This office responded that same day stating that we would oppose such request in that the filing deadline had already passed. That same day, Respondents' counsel, Philip Pierce, requested he be allowed to review the underlying transcript and exhibits on May 8. [See attached email exchanges].

In making their request for an extension, Respondents violated the Board's Rules and Regulations in several respects. First, Respondents violated Section 102.111(b) which states:

> A request for an extension of time to file a document shall be filed no later than the official closing time of the receiving office on the date on which the document is due. Requests for extensions of time filed within three days of the due date must be grounded upon circumstances not reasonably foreseeable in advance.

Respondents filed their request for an extension more than one week after the date the document was due. Furthermore, in its request, Respondents failed to state that Counsel for the Acting General Counsel opposed their request.

Respondents failure to review the record by May 1 was not an unforeseeable event. During both conference calls, on March 22 and April 16, Respondents raised the issue that they did not have the underlying record. In response, Counsel for the Acting General Counsel advised counsel that there were several avenues by which he could obtain the record, including contacting Domsey's former counsel, Paul Friedman and/or visiting the Region's office to review the transcript. There is no evidence that Mr. Friedman was contacted and Respondents waited until May 2, after the deadline, to request access to the record on May 8.

Respondents also violated Section 102.114(b) of the Rules and Regulations in failing to properly serve its request. As stated:

> In the event the document being filed electronically is required to be served on another party to a proceeding, the other party shall be served by electronic mail (e-mail), if possible.

Respondents e-filed its request to the Division of Judges but did not email, or otherwise serve, Counsel for the Acting General Counsel. Thus, Respondents' request was not properly served.

Finally, Counsel for the Acting General Counsel objects to a postponement of the remanded hearing which your Honor stated would be held in June. Co-counsel Kathy Drew King is scheduled to be on a detail in Washington, D.C. starting July 16 for three weeks. Thereafter, summer vacations for both counsel and their supervisor will require a delay until mid-September. Such delay is not in the interest of justice.

EXHIBIT E

Margolin & Pierce, LLP
Attorneys at Law
Suite 410
111 West 57th Street
New York, N. Y. 10019

E-FILED
5/10/2012

Philip Pierce
Errol F. Margolin

Marshall C. Berger,
Of Counsel

212 247-4844
Fax 212 247-1155

May 10, 2012

Honorable Michael Marcionese
Division of Judges
National Labor Relations Board
401 West Peachtree Street, N.W., Suite 1708
Atlanta, GA 30308-3510

Re: Domsey Trading Corp., et al.
Case No. 29-CA-14548, et al.

Dear Judge Marcionese:

I have just received the NLRB's opposition to our request for extension of time and rush to respond.

In all State and Federal Courts where ECF filing is required, all counsel are automatically provided with copies of all filings in a given case. I was not aware that the filing in this agency was different and required separate service of papers. Board counsel cites several procedural rules which we did not comply with as a reason for denial of our request. These are rules we were frankly not familiar with.

This elevation of form over substance should not be allowed to cause Your Honor to force the case to trial where it is not possible for us to be adequately prepared, so that the trial can be a fair one and not a sham.

We are in the process of reviewing the record at this time and ask that the extension of time we seek be granted. This case has festered for over twenty years through no fault of the Respondents and a slight further delay will prejudice no one.

Respectfully,

Margolin & Pierce, LLP,

Philip Pierce

cc: By e-mail

Kathy.drew-king@nlrb.gov
Elias.feuer@nlrb.gov
Aggie.kapelman@nlrb.gov

NLRB
E-Filing System

CASE INFO UPLOAD DOCUMENTS REVIEW CONFIRMATION

Frequently Asked Questions
E-Filing Terms
Documents that may be E-Filed

Print

Confirmation

You have successfully E-Filed document(s). You will receive an E-mail acknowledgement from this office when it receives your submission. This E-mail will note the official date and time of the receipt of your submission. Please save this E-mail for future reference. Please print this page for your records.

NOTE: This confirms only that the document was filed. It does not constitute acceptance by the NLRB.

Confirmation information

Confirmation Number: 449165

Date Submitted: 5/10/2012 2:21:10 PM (GMT-05:00) Eastern Time (US & Canada)

Office: Division of Judges

Case Information
Case Number: 29-CA-014548
Case Name: Domsey Trading Corp.
Role: Charged Party / Respondent

Contact Information
Philip Pierce
philippierce1@aol.com
111 West 57th Street
Suite 410
New York, NY 10019
(212)247-4844
Fax: (212)247-1155

Attached E-File(s)

Letter
Hon Michael Marcionese (Salm) 051012.pdf

Print

EXHIBIT F

DATED: 5-11-12 **NO COPIES INCLUDING COVER:** 4 **FAXED** ____

URGENT FAX

NLRB, Division of Judges
401 W Peachtree Street, Suite 1708
Atlanta, GA 30308-3519 2061
404-331-6652 (office) 404-331-~~2060~~ (fax)

TO	FAX
Phillip Pierce, Esq.	212-247-1155
& Errol Margolin, Esq.	212-247-1155
Scott Markowitz, Esq.	631-427-7855
John P. Gibbons, Esq.	516-742-1305
Jeffery A. Meyer, Esq.	516-681-1101
& Arthur Kaufman, Esq.	516-681-1101
Aggie Kapelman, Esq.	718-330-7579
& Kathy Drew King, Esq.	718-330-7579

FROM: Judge Michael A. Marcionese, Administrative Law Judge

SUBJECT: Domsey Trading Corporation, Domsey Fiber Corporation Domsey International Sales Corporation, a Single Employer
AND Arthur Salm, Individually
29-CA-14548 et al

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
ATLANTA BRANCH OFFICE
DIVISION OF JUDGES

DOMSEY TRADING CORPORATION, DOMSEY FIBER CORPORATION AND DOMSEY INTERNATIONAL SALES CORPORATION, A Single Employer AND ARTHUR SALM, Individually

and

INTERNATIONAL LADIES' GARMENT WORKERS' UNION, AFL-CIO

LOCAL 99, INTERNATIONAL LADIES' GARMENT WORKERS UNION, AFL-CIO

Case Nos. 29–CA–14548
29–CA–14619
29–CA–14681
29–CA–14735
29–CA–14845
29–CA–14853
29–CA–14896
29–CA–14983
29–CA–15012
29–CA–15119
29–CA–15124
29–CA–15137
29–CA–15147
29–CA–15323
29–CA–15324
29–CA–15325
29–CA–15332
29–CA–15393
29–CA–15413
29–CA–15447
29–CA–15685

ORDER GRANTING IN PART
RESPONDENT'S REQUEST FOR EXTENSION OF TIME

On December 30, 2011, the Board remanded this case to me, pursuant to a decision by the Court of Appeals for the Second Circuit denying enforcement to the Board's prior order in this compliance case. *Domsey Trading Corp.*, 357 NLRB No. 164. The Court, in denying enforcement, found that the Board had denied the Respondent the opportunity to question the discriminatees regarding their immigration status and to call an immigration expert as a witness. *NLRB v. Domsey Trading Corp.*, 636 F. 3d 33 (2d Cir. 2011). On March 22, 2012, during a conference call with the parties, I directed them to submit, by April 11, lists of those discriminatees who should be recalled pursuant to the remand to answer questions regarding their immigration status, noting that a number of the discriminatees were either US citizens or had documented authorization to work in the U.S. during the backpay period. I also directed the Respondent to advise by the same date whether it still wished to call the immigration expert as a witness. In a second conference call, on April 16, 2012, the Respondent claimed it had been

unable to comply with my directive because it did not have access to the record in the underlying case. The Respondent's counsel also was unprepared to answer whether it still wished to call the immigration expert as a witness. I then directed the parties to file pre-trial memorandum regarding the issue of which discriminatees were subject to the remand order and on what basis and gave a deadline of May 1, 2012 to do so.

Although Counsel for the Acting General Counsel filed a timely memorandum setting forth her position regarding the remand and identifying approximately 33 discriminatees whose status was arguably at issue in the remand, counsel for the Respondent did not file anything. Instead, on May 7, almost a week after the deadline, the Respondent submitted a letter asking for an additional 30 days to submit its memorandum. The basis for this request was the same claim made on March 22 and April 16, i.e. that counsel did not have access to the record in the underlying proceeding. It should be noted that the Acting General Counsel's representative had advised all parties during the April 16 conference call that the record was available for review at the Board's regional office and that copies might also be available from the court of appeals or from the Respondent's former counsel.

On May 10, Counsel for the Acting General Counsel submitted a letter opposing any extension of time and the Respondent filed a response. Having reviewed the Acting General Counsel's May 1 memorandum and considered the Respondent's May 7 request and the May 10 correspondence from both parties, I have decided to address this issue by ordering the Respondent to show cause, no later than May 25, 2012, why any discriminatees, other than the 33 identified in General Counsel's memorandum, should be required to submit to an examination of their immigration status and on what basis. In addition, by the same date, the Respondent shall advise whether it still seeks the testimony of an immigration expert at the remanded hearing. All parties should also advise the undersigned, no later than close of business May 25, 2012, regarding the dates they are available for a hearing in this matter between June 18, 2012 and July 13, 2012. I will then issue a Notice of Hearing with my ruling regarding the scope of evidence to be presented at the remanded hearing.

SO ORDERED

Dated at Atlanta, GA this 11th day of May, 2012.

Michael A. Marcionese
Administrative Law Judge

Domsey Trading Corp.
29-CA-14548, et al

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Order Granting in Part Respondent's Request for Extension of Time was served via facsimile upon each of the following parties as designated:

Phillp Pierce, Esq.
Margolin & Pierce, LLP
111 West 57th Street, Ste. 410
New York, NY 10019
FAX (212) 247-1155

Errol Margolin, Esq.
Margolin & Pierce LLP
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New York, NY 10019-2229
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Scott Markowitz, Esq.
Markowitz & Rabbach LLP
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Jeffery A. Meyer, Esq.
Kaufman Dolowich Voluck & Gonzo, LLP
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FAX (516) 681-1101

Arthur Kaufman, Esq.
Kaufman Dolowich Voluck & Gonzo, LLP
135 Crossway Park Drive, Ste. 201
Woodbury, NY 11797-2005
FAX (516) 681-1101

Aggie Kapelman, Esq.
National Labor Relations Board
2 Metro Tech Center Ste. 5100

STOPPED

EXHIBIT G

E - FILED
5/24/2012

UNITED STATES OF AMERICA
BEFORE THE NOATIONAL LABOR RELATIONS BOARD
ATLANTA BRANCH OFFICE
DIVISION OF JUDGES

DOMSEY TRADING CORPORATION, DOMSEY FIBER CORPORATION AND DOMSEY INTERNATIONAL SALES CORPORATION, A Single Employer AND ARTHUR SALM, Individually And INTERNATIONAL LADIES' GARMENT WORKERS' UNION, AFL-CIO LOCAL 99, INTERNATION LADIES' GARMENT WORKERS UNION, AFL-CIO	Case Nos.	29-CA-14548 29-CA-14619 29-CA-14681 29-CA-14735 29-CA-14845 29-CA-14853 29-CA-14896 29-CA-14983 29-CA-15012 29-CA-15119 29-CA-15124 29-CA-15137 29-CA-15147 29-CA-15323 29-CA-15324 29-CA-15325 29-CA-15332 29-CA-15393 29-CA-15413 29-CA-15447 29-CA-15685

DECLARATION SHOWING CAUSE WHY CROSS EXAMINATION OF DISCRIMINATEES AS TO IMMIGRATION STATUS SHOULD NOT BE LIMITED TO THE 33 IDENTIFIED BY GENERAL COUNSEL

To The Honorable Michael A. Marcionese, Administrative Law Judge:

1. The Domsey corporation respondents, by their undersigned counsel, oppose the Board's effort to limit cross-examination as to immigration status to 27 discriminatees of its choice out of 202 such persons on the grounds, inter alia, that it is inconsistent with the facts and prevailing law, constitutes an effort to subvert the ruling of the Second Circuit Court of Appeals

in National Labor Relations Board v. Domsey Trading Corporation et al, 636 F.3d 33 (2011) as well as Hoffman Plastic, 535 U.S. 137.

2. In declining to enforce the Board's two Supplemental Decisions awarding $1,075,614.30 in backpay to 202 discriminatees, the Second Circuit made it plain that the Board had abused its discretion in ratifying the ALJ's ruling that Domsey could not ask questions concerning the discriminatees' immigration status, relevant to the claim for backpay eligibility. In footnote [4] to the Second Circuit opinion, the Court expressly notes that the Board did not address Domsey's argument that "for the vast majority of discriminatees, it was improperly prohibited from asking about immigration status." (emphasis added) (The 27 discriminatees the Board would limit Domsey to questioning hardly add up to the "vast majority" of the 202 discriminatees alluded to by the Court.)

THE POSTURE OF THE CASE

3. By its remand, the Second Circuit has moved the clock back to the point where the Board is presenting witnesses to establish the amount of damages (backpay) to which they are entitled, and Domsey is entitled to cross-examine those witnesses. It is plain from the record that the limited examination permitted by the ALJ did not constitute full searching cross examination designed to test the witnesses' veracity and search for truth that cross examination is intended to accomplish and which constitutes due process of law.

> The age-old tool for ferreting out truth in the trial process is the right to cross-examination. "For two centuries past, the policy of the Anglo-American system of evidence has been to regard the necessity of testing by cross-examination as a vital feature of the law." 5 Wigmore, Evidence §1367 (Chadbourn rev. 1974).

4. The Board argues that all the remaining Domsey discriminatees are exempt from testifying because (1) respondents' expert witness established that those employees were

employed using valid social security numbers (2) the employees were already examined on their status; (3) they were pre-IRCA hires whose examination was not precluded; (4) their examination was waived; or (5) their status was determined in the Board's September 25, 2008 Supplemental Order.

These contentions are so farfetched that they underscore Domsey's principal contention that it did not have its day in Court and will be responded to in Order:

(1) On October 29, 1998, Andrea Azram testified that she is an expert on the "enumeration of social security numbers" which requires no special training and is "self explanatory." (4033/7537). She testified she was at that time employed by an investigative firm (4025-26/7529,30).

Azram went on to explain that in this case she was supplied with social security numbers by the attorneys for Domsey Trading and merely compared the numbers to tables which explains what numbers would be issued in a given year and in what geographical location, found on the public Social Security Administration website to ascertain if the numbers could have even been issued. (4047/7551). Printouts of those tables were introduced as Exhibits 331, 332 and 333.

She then ran searches to see if the numbers were ever used to obtain credit by searching "credit headers" and in some cases she was able to connect the name of a discriminatee with the number provided. For each social security numbers she searched, she listed the names and other information she could find which were associated with that number. These reports are Exhibits R-330, R-335 and R-336.

The [Board] now argues that every discriminatee on this list is excluded from being called as a witness because their immigration status has been proven. Even assuming the list contained only the names that Azram was able to in some way attach to the social security

number, the same does not prove the legal status of the discriminatee, as will be discussed. Moreover, she was only able to connect 50 of the discriminatees to social security numbers in the report. The balance of the discriminatees listed and their alleged social security numbers reported upon in Azram's report shows that the number was not issued by the Social Security Administration, she could not connect the social security number with anyone, the discriminatee was using multiple numbers (which is highly suggestive of that person not having a valid social security number of their own) or the number was found to be associated with another person.

Concerning the 50 names which were somehow connected to a particular social security number according to credit headers, Azram did not purport to know or to have any means to discover whether the social security number was actually issued to that person by the Social Security Administration or that the same would mean they were citizens legally able to work in the United States. In fact, even a noncitizen, who is not eligible to work in the United States, can obtain a social security number in certain circumstances according to the Social Security Administration (See Exhibit).

The only things that Azram purported to be able to establish is that a particular number is a valid one which was ever issued by the Social Security Administration, and in some cases that a particular person tried to use a particular number to obtain credit. She in no way proved or attempted to prove that any of the discriminatees were legally able to work in the United States.

(2) As noted by the Second Circuit and in the record of proceedings, examination as to immigration status was curtailed or denied. Now that proper cross examination may proceed by order of the Second Circuit access even to previously examined employees for cross examination is clearly warranted.

(3) (4) As to pre Irca hires whose examination was "not precluded allegedly or waived," there is no evidence in the record of which we are aware that those persons were ever called by the Board to testify or of an express waiver by Domsey's then counsel. In any event, given the ALJ's restriction on cross examination as to immigration status, it may well have been the thought of counsel at the time not to pursue a vain task with each and every such disciminatee. Given the Second Circuit's ruling, that is no longer the case and proper cross examination is now possible.

(5) Of interest in these proceedings is the Board's silence on whether it, with all of its massive resources, has taken any steps at all to determine whether in proceeding with this case, it is complying with the law as laid down by the Supreme Court in Hoffman Plastic. Is it proceeding in good faith after having verified the legal immigration status of the discriminates for whom it seeks recovery? As stated in Rule 1.16 of the ABA Rules of Professional Conduct:

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if

(1) The representation will result in a violation of the Rules of Professional Conduct or other law..."

(Paragraph (c) discusses issues not relevant here.)

(6) We do not quarrel with the aspect of the Board's September 25, 2008 Supplemental Order which reduced the backpay award and agree that the discriminatees involved in that proceeding need not be examined again.

(7) The basis for the full cross-examination on immigration status sought by Domsey is clear from the decision of the Second Circuit remanding the case because the Board abused its discretion in denying that right during the underlying hearing. The Court made it clear that

Domsey had fully preserved its rights on this issue, having been denied such cross examination of a majority of the discriminatees. The case is past the pleading stage and what is at issue is crystal clear. Domsey's due process right of cross examination constitutes the grounds, per se, for the determination it seeks.

(8) Domsey does not seek the testimony of an immigration expect at the remanded hearing.

Dated: New York, New York
May 24, 2012

Margolin & Pierce, LLP
Attorneys for Plaintiff

By: _____
Errol F. Margolin
111 West 57th Street, Suite 410
New York, NY 10019
212-247-4844

UNITED STATES OF AMERICA
BEFORE THE NOATIONAL LABOR RELATIONS BOARD
ATLANTA BRANCH OFFICE
DIVISION OF JUDGES

DOMSEY TRADING CORPORATION, DOMSEY FIBER CORPORATION AND DOMSEY INTERNATIONAL SALES CORPORATION, A Single Employer AND ARTHUR SALM, Individually	Case Nos.	29-CA-14548 29-CA-14619 29-CA-14681 29-CA-14735 29-CA-14845 29-CA-14853 29-CA-14896 29-CA-14983 29-CA-15012 29-CA-15119 29-CA-15124 29-CA-15137 29-CA-15147 29-CA-15323 29-CA-15324 29-CA-15325 29-CA-15332 29-CA-15393 29-CA-15413 29-CA-15447 29-CA-15685
And		
INTERNATIONAL LADIES' GARMENT WORKERS' UNION, AFL-CIO		
LOCAL 99, INTERNATION LADIES' GARMENT WORKERS UNION, AFL-CIO		

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Declaration Showing Cause Why Cross Examination of Discriminatees As To Immigration Status Should Not Be Limited To The 33 Identified By General Counsel was served via facsimile upon each of the following parties as designated:

Judge Michael A. Marcionese, ALJ
National Labor Relations Board, Division of Judges
401 W. Peachtree Street, Suite 1708
Atlanta, GA 30308-3519

Scott Markowitz, Esq.
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Jeffery a. Meyer, Esq.
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Aggie Kapelman, Esq.
National Labor Realations Board
2 Metro Tech Center, Suite 5100
Brooklyn, NY 11201-4201

Kathy Drew King, Esq.
National Labor Realations Board
2 Metro Tech Center, Suite 5100
Brooklyn, NY 11201-4201

Dated: New York, NY
May 24, 2012

Margolin & Pierce, LLP

By _____
Philip Pierce
Attorneys for the Petitioner – Arthur Salm
111 West 57th Street – Suite 410
New York, NY 10019
212-247-4844

Margolin & Pierce, LLP
Attorneys at Law
Suite 410
111 West 57th Street
New York, NY 10019
212-247-4844 Tel.
212-247-1155 Fax

facsimile transmittal

To:	Judge Michael A. Marcionese, Administrative Law Judge	**Fax:**	404-331-2061
	Scott Markowitz, Esq.		631-427-7855
	John P. Gibbons, Esq.		516-742-1305
	Jeffrey A. Meyer, Esq.		516-681-1101
	Arthur Kaufman, Esq.		516-681-1101
	Aggie Kapelman, Esq.		718-330-7579
	Kathy Drew King, Esq.		718-3307579
From:	Philip Pierce, Esq.	**Date:**	5/24/2012
Re:	Domsey Trading Corporation, Domsey Fiber Corporation, Domsey International Sales Corporation, a Single Employer and Arthur Salm Individually 29-Ca-14548 et al	**Pages:**	9
CC:			

☐ **Urgent** ☐ **For Review** ☐ **Please Comment** ☐ **Please Reply** ☐ **Please Recycle**

TRANSMISSION VERIFICATION REPORT

TIME : 05/24/2012 14:11
NAME : MARGOLIN & PIERCE
FAX : 12122471155
TEL : 12122474844
SER.# : 000K5J913362

DATE,TIME	05/24 14:10
FAX NO./NAME	14043312061
DURATION	00:01:16
PAGE(S)	05
RESULT	OK
MODE	STANDARD ECM

Margolin & Pierce, LLP
Attorneys at Law
Suite 410
111 West 57th Street
New York, NY 10019
212-247-9819 Tel
212-242-7155 Fax

facsimile transmittal

To:	Judge Michael A. Marcionese, Administrative Law Judge	**Fax:**	404-331-2061
	Scott Markowitz, Esq.		631-427-7855
	John P. Gibbons, Esq.		516-742-1305
	Jeffrey A. Meyer, Esq.		516-681-1101
	Arthur Kaufman, Esq.		516-681-1101
	Aggie Kapelman, Esq.		718-330-7579
	Kathy Drew King, Esq.		718-3307579
From:	Philip Pierce, Esq.	**Date:**	5/24/2012
Re:	Domsey Trading Corporation, Domsey Fiber Corporation, Domsey International Sales Corporation, a Single Employer and Arthur Salm Individually 29-Ca-14548 et al	**Pages:**	9
CC:			

BROADCAST REPORT

TIME : 05/24/2012 14:02
NAME : MARGOLIN & PIERCE
FAX : 12122471155
TEL : 12122474844
SER.# : 000K5J913362

PAGE(S) 09

DATE	TIME	FAX NO./NAME	DURATION	PAGE(S)	RESULT	COMMENT
05/24	13:44	16314277855	02:22	09	OK	ECM
05/24	13:47	15167421305	02:20	09	OK	ECM
05/24	13:50	15166811101	02:29	09	OK	ECM
05/24	13:53	17183307579	02:25	09	OK	ECM
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EXHIBIT H

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
ATLANTA BRANCH OFFICE
DIVISION OF JUDGES

DOMSEY TRADING CORPORATION, DOMSEY FIBER CORPORATION AND DOMSEY INTERNATIONAL SALES CORPORATION, A Single Employer AND ARTHUR SALM, Individually

and

INTERNATIONAL LADIES' GARMENT WORKERS' UNION, AFL-CIO

LOCAL 99, INTERNATIONAL LADIES' GARMENT WORKERS UNION, AFL-CIO

Case Nos. 29–CA–14548
29–CA–14619
29–CA–14681
29–CA–14735
29–CA–14845
29–CA–14853
29–CA–14896
29–CA–14983
29–CA–15012
29–CA–15119
29–CA–15124
29–CA–15137
29–CA–15147
29–CA–15323
29–CA–15324
29–CA–15325
29–CA–15332
29–CA–15393
29–CA–15413
29–CA–15447
29–CA–15685

ORDER REGARDING REMAND AND NOTICE OF HEARING

On December 30, 2011, the Board remanded this case to me, pursuant to a decision by the Court of Appeals for the Second Circuit denying enforcement to the Board's prior order in this compliance case. *Domsey Trading Corp.*, 357 NLRB No. 164.[1] The Court, in denying enforcement, found that the Board erred by failing to consider the Respondent's objections to my pre-*Hoffman Plastics*[2] evidentiary rulings limiting the Respondent's questioning of backpay claimants regarding their immigration status. The Court concluded that the Board had "abused its discretion by failing to remand the case to the administrative law judge for further

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[1] The Board's order which the court reviewed can be found at 355 NLRB No. 89 (August 6, 2010), re-affirming its prior two-member Board order reported at 353 NLRB 86 (2008).

[2] *Hoffman Plastics Compounds., Inc. v. NLRB*, 535 U.S. 137 (2002).

proceedings consistent with *Hoffman." NLRB v. Domsey Trading Corp.*, 636 F. 3d 33, 38 (2d Cir. 2011). The Court of Appeals held that, post-*Hoffman*, an employer may question discriminatees regarding their immigration status. However, the court recognized the Board's right to preserve the integrity of its proceedings by fashioning evidentiary rules regarding such questioning. The only guidance provided by the court with respect to such "evidentiary rules" can be found in the following quote:

> The only limits the Board may place on cross-examination are the usual limits the presider may place on cross-examination. Such a limit may, for instance, require an employer, before embarking on a cross-examination of a substantial number of claimants, to proffer a reason why its IRCA-required verification of immigration status with regard to a particular claimant now seems questionable or in error.

636 F.3d at 38. The Board, in its remand order, directed that I "afford the parties an opportunity to present evidence on the remanded issue subject to those limits generally approved by the court..." 357 NLRB No. 164, supra.

Following the remand, I held two conference calls with the parties to discuss whether all of the 202 discriminatees, or a smaller number, would be required to submit to questioning regarding their immigration status pursuant to the Board and court orders. As I pointed out to the parties, there were a number of discriminatees whose status was not in question, either because they were native-born or naturalized citizens, or because they had demonstrated their eligibility to work in the earlier hearing. I directed the parties to submit memoranda, by May 1, setting forth their position on the number and identity of backpay claimants who would be questioned at the hearing on remand. Only the General Counsel submitted a timely memo. Counsel for the Respondent belatedly asked for more time to submit its memorandum. By order dated May 11, I permitted the Respondent to submit its position on this issue in the form of a response to an order to show cause why General Counsel's position should not be accepted. Respondent submitted a response to my order on May 24 and General Counsel also submitted a further response.

Counsels for the General Counsel, in their May 1 memorandum, argued that 120 discriminatees should not be required to submit to cross-examination because an expert on the social security numbering system testified on the Respondent's behalf that the social security numbers they used while working for the Respondent were valid.[3] The General Counsel argued further that another 14 discriminatees who were hired before the effective date of the Immigration Reform and Control Act (IRCA) of 1986 had already testified regarding their status in response to questioning by the Respondent's counsel and should not have to be recalled. In addition, pursuant to an earlier remand by the Board, the immigration status of six discriminatees was established, with three being found eligible to work during all or part of the backpay period. Finally, the General Counsel argues that Respondent's counsel, during the prior hearing, had waived its right to question three other discriminatees whose backpay period was very short. Based on the above, counsels for the General Counsel submitted that no more than 30 discriminatees were subject to being re-called to testify pursuant to the remand.[4]

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[3] Included in this number are three discriminatees who were missing at the time of the prior hearing and who have since been located by the General Counsel.

[4] Even as to these discriminatees, the General Counsel would require the Respondent to make a factual showing that it had reason to believe that the immigration documents submitted by these individuals when hired and upon which the Respondent relied to satisfy its obligations

Continued

Counsel for the Respondent, in its May 24 response, disputes the General Counsel's claim that it should be limited to questioning, at most, only 30 backpay claimants. In Respondent's view, the Second Circuit's remand "has moved the clock back to the point where the Board is presenting witnesses to establish the amount of damages (back pay) to which they are entitled, and Domsey is entitled to cross-examine those witnesses." Under this view, it appears the Respondent is arguing that all of the discriminatees should be recalled to submit to cross-examination, even beyond the question of their immigration status. In making this argument, the Respondent is overreaching and is ignoring the well-established precedent regarding the relative burdens in a back pay proceeding.

In addition to this general argument, counsel for the Respondent also disputed the specific claims of the General Counsel identifying those discriminatees who should be excused from further questioning. However, nowhere in its memorandum does the Respondent identify those discriminatees it believes are required to submit to questioning regarding their status. This is another indication that the Respondent expects all 202 discriminatees, or at least, those that can still be found, should be summoned to another hearing to answer questions regarding their immigration status more than 20 years ago. I do not believe that was the intent of the remand.

I agree with the General Counsel that those discriminatees who have already been questioned about their immigration status or whose status was determined in the prior decisions of the Board, and those who were American citizens during the back pay period, need not testify again. Similarly, any discriminatee hired before the effective date of IRCA of 1986 shall not be required to appear, as the Respondent was not precluded from questioning those discriminatees. If the Respondent chose not to cross-examine such claimants when it had the ability to do so, it effectively waived its right as to those discriminatees.

With respect to those discriminatees that the Respondent's own expert witness determined had social security numbers that were validly issued, I agree with the Respondent that such a conclusion does not necessarily mean that, at the time in question, the individual using that social security number was eligible to work in this country. At the same time, because these individuals have already been determined to have used a valid social security number during their employment with the Respondent, the Respondent must demonstrate that there is a basis for questioning their eligibility to work before they will be recalled to the stand.

Having considered the arguments made by counsel, and based on the above, I have determined to open the hearing on June 26, 2012 in order to permit the Respondent to cross-examine the 27 discriminatees named at page 9 of General Counsel's May 1, memorandum. In addition, the Respondent is entitled to question all 6 of the previously missing discriminatees who have been located since the close of the first hearing. Because these six never appeared to answer questions, the Respondent never had the opportunity it is entitled to in a back pay proceeding to question them regarding mitigation issues, including their immigration status. Whether any other discriminatees will be required to submit to further cross-examination will be determined only after the Respondent has made a specific showing, as suggested by the Court of Appeals, that the IRCA-required verification of immigration status upon which it relied when hiring the individual claimant "now seems questionable or in error."

In the interest of expediting these proceedings, I shall direct the General Counsel, to the

---

under IRCA of 1986 were not valid. See *Flaum Appetizing Corp.*, 357 NLRB No. 162 (December 30, 2011).

extent it has not already done so, to take steps to investigate the immigration status of the individuals who are required to appear. If the General Counsel determines that a particular claimant subject to cross-examination was not eligible to work in this country during the back pay period, it is expected that General Counsel will withdraw the back pay claim as to that individual.

Finally, the Court of Appeals, in remanding this case, found that my ruling excluding testimony from the Respondent's immigration expert was in error. The Respondent's counsel, in his memorandum, has stated that the Respondent no longer seeks to have an immigration expert testify in this proceeding.

Accordingly, I issue the following

NOTICE OF HEARING

PLEASE TAKE NOTICE that on June 26, 2012, at 9:30 a.m. (local time), at a Hearing Room to be designated in the National Labor Relations Board's Regional Office at Two Metro Tech Center, 5th Floor, Brooklyn, NY, and on consecutive days thereafter through June 28, 2012,[5] a hearing will be conducted before the undersigned administrative law judge for the purpose of taking evidence pursuant to the Board's Remand Order in this case. At the hearing, the Respondent and any other party to this proceeding have the right to appear and present testimony regarding the issues on remand. The procedures to be followed at the hearing are those set forth in the Board's Rules and Regulations with respect to compliance proceedings.

Dated at Atlanta, GA this 4th day of June, 2012.

Michael A. Marcionese
Administrative Law Judge

[5] Any additional hearing days required to complete the presentation of evidence will be determined before the close of this hearing.

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Order Regarding Remand and Notice of Hearing was served via facsimile and UPS mail upon each of the following parties as designated:

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Subscribed and sworn to before me this 4th day of June, 2012.

Judy D. Bailey, Designated Agent

Willene F. Heflin

DATED: 6–4–12 NO COPIES INCLUDING COVER: 6 FAXED ____

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FROM: Michael A. Marcionese, Administrative Law Judge

SUBJECT: Domsey Trading Corporation, Domsey Fiber Corporation and Domsey International Sales Corporation, A Single Employer AND Arthur Salm, Individually
29-CA-14548-RR et al

EXHIBIT I

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Marshall C. Berger,
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FAXED 6 6 2012

June 6, 2012

BY FAX 404-331-2061

Honorable Michael Marcionese
Division of Judges
National Labor Relations Board
401 West Peachtree Street, N.W., Suite 1708
Atlanta, GA 30308-3510

Re: Domsey Trading Corp., et al.
Case No. 29-CA-14548, et al.

Dear Judge Marcionese:

We are in receipt of your June 4, 2012 "Order Regarding Remand and Notice of Hearing." With all due respect, we take issue with your reasoning and interpretation of the Second Circuit decision denying enforcement of the Board's prior order. Accordingly, we object pursuant to Section 102.41 of the Board's Rules and Regulations, to the conduct of the hearing as limited by your Order to the cross-examination of only 27 out of 202 discriminatees, as to immigration status. The limitation effectively turns the hearing at issue into a token process which eviscerates the teachings of Hoffman Plastics, as reiterated by the Second Circuit in its remand.

With respect to my comment that by remanding the case to the Board to allow for cross-examination as to immigration status, the Court of Appeals had effectively moved the clock back to permit such examination, I did not suggest expansion of the scope of such examination beyond immigration status. Your interpretation to the contrary and conclusion that we are therefore "overreaching" is completely unwarranted.

The Second Circuit comment about the Board's right to preserve the integrity of its proceedings by fashioning evidentiary rules regarding (such) questioning does not equate with asking the respondents to do the impossible; i.e., know of issues regarding a discriminatee's immigration status of 20 years ago before being able to question him/her. As to the IRCA comment, the Board, on August 9, 2011 issued its supplemental Decision and Order in Mezonos Maven Bakery, Inc., et al, 29-CA-25476, expressly holding that backpay may not be awarded to undocumented workers whether or not IRCA was complied with. Respondents, accordingly should not be denied the opportunity to test the immigration status and credibility of post IRCA employees by cross-examination.

Section 102.39 of the Boards Rules and Regulations provides that the proceedings contemplated here shall, so far as practicable, be conducted according to the Federal Rules of Evidence, (28 U.S.C. 723.B, 723-C). At this point, there is no other way to test the employee's immigration status of 20 years ago but by cross-examination according to customary trial practice. To require respondents to know in advance of any infirmities in such an employees' status before being allowed to examine him/her, where that person's credibility can be tested and assessed by the judge presiding, is to require the impossible, the nonexistent crystal ball.

In order to expedite such examination the accompanying request was made of the Regional Director, per Section 102.31 of the Boards' rules, to issue subpoenas to the discriminatees seeking backpay. It was first directed to the Regional Director because the hearing had not yet commenced. However Board counsel advises that the request should be made of you, and we now do so. However, contrary to the limitation you have imposed, we would request a subpoena for each employee except those mentioned below.

As earlier noted, cross-examination of only 27 out 202 discriminatees as to immigration status is not meaningful or consistent with the thrust of the Court of Appeals decision holding that the Board had committed prejudicial error in not allowing full cross-examination of the majority of the discriminatees as to immigration status. We do not quarrel with the exclusion of the 14 employees who had already testified, nor the six examined pursuant to an earlier remand. If the thrust and intent of the Hoffman Plastics case, 535 U.S. 137, is not to be thwarted by the imposition of so-called evidentiary requirements which would necessitate the use of extra-sensory perception to comply with, then the majority of discriminatees should be made available for the cross-examination contemplated by the remand.

Lastly, we understand human nature dictates that you consciously or unconsciously justify your prior determinations in this matter. Nevertheless your most recent decision to gut the heart of the defendants case by seeking to limit cross examination to 27 witnesses out of 202 discriminatees leaves us no choice, as Domsey's counsel, but to ask that you recuse yourself from this matter pursuant to 102.37 of the Rules and Regulations. It is our intention that Domsey have a full and fair opportunity to be heard and we bear no ill will toward Your Honor, however, as it stands now we cannot move forward in the defense of Domsey Trading, with you making the rules.

We waive none of the arguments set forth in response to Your Honor's Order to Show Cause, though not mentioned herein.

Respectfully,

Margolin & Pierce, LLP,

Errol F. Margolin

cc: James G. Paulsen, Regional Director
NLRB, Region 29
Two Metro Tech Center – 5th Fl.
Brooklyn, NY 11201-3838

By Facsimile
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May 30, 2012

VIA FAX AND MAIL

James G. Paulsen - Director
National Labor Relations Board
Region 29
Two Metro Tech Center – 5th Floor
Brooklyn, NY 11201-3838

Re: Domsey Trading Corporation, et al
29-CA-14548 et al

Dear Director Paulsen:

We are counsel for the Domsey Respondents in the captioned matter. We write, pursuant to the provisions of Section 102.31(a) of the Board's Rules and Regulations to request the issuance of subpoenas to each of the "discriminatees" seeking recovery of back pay in this case.

Annexed is a copy of the decision of the United States Court of Appeals for the Second Circuit which declined to enforce the Board's underlying decisions in this matter, found it had committed prejudicial error in not allowing cross-examination of the majority of the discriminatees as to immigration status during the period in question, and remanded the matter for further proceedings, to allow for such cross-examination.

Accordingly, and to expedite such cross-examination, we ask for the issuance of subpoenas to each back pay claimant requiring them to appear to be cross-examined as to their immigration status and to produce at that time:

(i) All written documentation evidencing the place, time and manner of entry into the United States.

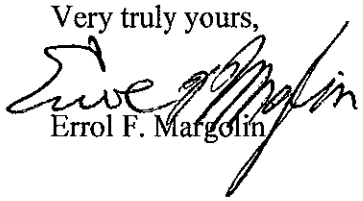
(ii) All written documentation comprising requests for and issuance of U.S. Social Security Numbers.

(iii) All written documentation evidencing application for and issuance of U.S. visas, work permits, green cards or citizenship papers.

(iv) Copies of all tax returns filed during the period of employment by the Domsey Respondents, up to and including 1989 and 1990, the back pay period.

The remanded hearing has been assigned to A.L.J. Michael A. Marcionese, who conducted the original trial. He has proposed trial dates during June and July but the dates have not yet been determined, counsel involved having indicated other commitments during that period. We ask that the subpoenas we request be made returnable during such trial dates as are ultimately determined.

Very truly yours,



Errol F. Margolin

cc: Judge Michael A. Marcionese
John P. Gibbons, Jr., Esq.
Jeffrey A. Meyer, Esq.
Arthur Kaufman, Esq.
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	James G. Paulsen, Director		
From:	Philip Pierce, Esq.	**Date:**	6/6/2012
Re:	Domsey Trading Corporation, Domsey Fiber Corporation, Domsey International Sales Corporation, a Single Employer and Arthur Salm Individually 29-Ca-14548 et al	**Pages:**	6
CC:			

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	James G. Paulsen, Director		718-330-7579
From:	Philip Pierce, Esq.	**Date:**	6/6/2012
Re:	Domsey Trading Corporation, Domsey Fiber Corporation, Domsey International Sales Corporation, a Single Employer and Arthur Salm Individually 29-Ca-14548 et al	**Pages:**	6

EXHIBIT J

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
ATLANTA BRANCH OFFICE
DIVISION OF JUDGES

DOMSEY TRADING CORPORATION, DOMSEY FIBER CORPORATION AND DOMSEY INTERNATIONAL SALES CORPORATION, A Single Employer AND ARTHUR SALM, Individually

and

INTERNATIONAL LADIES' GARMENT WORKERS' UNION, AFL-CIO

LOCAL 99, INTERNATIONAL LADIES' GARMENT WORKERS UNION, AFL-CIO

Case Nos. **29-CA-14548**
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29-CA-15323
29-CA-15324
29-CA-15325
29-CA-15332
29-CA-15393
29-CA-15413
29-CA-15447
29-CA-15685

ORDER DENYING RESPONDENT'S MOTION FOR RECUSAL

On June 4, 2012, I issued an Order Regarding Remand and a Notice of Hearing in this case. On June 6, 2012, Counsel for the Respondent submitted a letter objecting to my ruling.[1] Counsel also requested, pursuant to Section 102.37 of the Board's Rules and Regulations, that I recuse myself from hearing this matter. The Respondent based this request on my June 4 ruling which, it contends, "...gut[s] the heart of the defendant's case by seeking to limit cross examination to 27 out of 202 witnesses." Counsel has misinterpreted my ruling.

[1] Section 102.26 of the Board's Rules and Regulations sets forth the procedure for appealing an administrative law judge's interlocutory rulings.

The June 4 Order did not limit cross-examination to the 27 back pay claimants identified by counsel for the General Counsel. I specifically ordered that, in addition to these 27 discriminatees/claimants, the six formerly missing discriminatees who have been located since the initial compliance hearing in this case would be required to appear so that the Respondent would have an opportunity to question them regarding their claim. The same order would apply to any other discriminatees who were missing that can be located in time to testify in the upcoming hearing. Moreover, I ruled that other discriminatees would be required to appear and submit to cross-examination if the Respondent "demonstrate[d] that there is a basis for questioning their eligibility to work during the back pay period." This ruling complies with the explicit guidance offered by the Court of Appeals in remanding this case and seeks to preserve the integrity of the Board's processes. It does no more than require the Respondent to make a showing that its desire to question the discriminatees regarding their immigration status is more than a "fishing expedition."

The Respondent, in making this request, also suggests that I might be biased because I might be predisposed to justify my prior determinations in this case that were the subject of the remand. As the Supreme Court noted in *Litekey v. United States,* 510 U.S. 540 (1994):

> Opinions held by judges as a result of what they learned in earlier proceedings are not bias or prejudice requiring recusal, and it is normal and proper for a judge to sit in the same case upon remand and successive trials involving the same defendant.

Because the Respondent has not presented any evidence demonstrating that I would not be able to render a fair judgment in this case, I shall respectfully decline the request to recuse myself in this matter.

ACCORDINGLY,

Respondent's Request is denied.

Dated, at Atlanta, Georgia this 7th day of June, 2012

Michael A. Marcionese
Administrative Law Judge

Domsey Trading
29-CA-14548, et al.

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Order Denying Respondent's Motion for Recusal was served via facsimile upon each of the following parties:

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Subscribed and sworn to before me this 7th day of June, 2012.

Judy B. Bailey, Designated Agent

Willene F. Heflin

DATED: 6-7-12 **NO COPIES INCLUDING COVER:** 4 **FAXED** _____

F A X

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John P. Gibbons Jr., Esq.	516-742-1305
Jeffery A. Meyer, Esq.	516-681-1101
& Arthur Kaufman, Esq.	516-681-1101

FROM: Michael A. Marcionese, Administrative Law Judge

SUBJECT: Domsey Trading Corporation, Domsey Fiber Corporation and Domsey International Sales Corporation, A Single Employer AND Arthur Salm, Individually
29-CA-14548-RR et al